No. 96-1134

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

UNITED STATES OF AMERICA,
Petitioner
v.
CEDRIC W. MOBLEY, CHESTER NASH, JR., and CHAD E. LYNN,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Military Rule of Evidence 707, which provides that evidence of a polygraph examination is not admissible in court-martial proceedings, is an unconstitutional abridgement of military defendants' right to present a defense.

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BRIEF IN OPPOSITION

Pursuant to this Honorable Court's order of 10 March 1997, respondents hereby file this Brief in Opposition to petitioner's petition for a writ of certiorari. The respondents, Sergeant Cedric W. Mobley, Staff Sergeant Chester Nash, Jr., and Airman First Class (A1C) Chad E. Lynn, respectfully pray that the writ of certiorari filed by the petitioner, the United States of America, to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in their cases on 18 September 1996, 18 September 1996, and 10 October 1996, respectively, be denied.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces in *United States v. Mobley* is reported at 44 MJ 453 (1996). The opinion of the United States Air Force Court of Criminal Appeals is unreported. The order and judgment of the United States Court of Appeals for the Armed Forces in *United States v. Nash* is reported at 44 MJ 456 (1996). The opinion of the United States Air Force Court of Criminal Appeals is unreported. The order and judgment of the United States Court of Appeals for the Armed Forces in *United States v. Lynn* is reported at 45 MJ 403 (1996). The opinion of the United States Air Force Court of Criminal Appeals is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Sixth Amendment provides, in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ."

STATEMENT OF THE CASES

Petitioner's statement of the case regarding the facts of the courts-martial pertaining to respondents *Nash* and *Mobley* is accepted.

On 5 March 1991, respondent A1C Chad Lynn was tried by general court-martial for wrongfully using marijuana, larceny, and conspiring to commit larceny, in violation of Articles 112a, 121 and 81 of the UCMJ, 10 U.S.C. 912a, 921 and 881. Before trial, A1C Lynn submitted to a polygraph examination by a private polygrapher, Mr. Douglas E. Holbrook. When asked if he had committed the crimes with which he'd been charged, A1C Lynn answered "no." The polygrapher found there was no deception indicated in A1C Lynn's responses. A1C Lynn offered to take a government polygraph, but the Government declined the offer. The polygraph issue in his case arose when the defense moved to dismiss the charges for a lack of speedy trial. To show prejudice, the defense argued that while A1C Lynn was awaiting trial Mil.R.Evid. 707 became effective, thereby preventing him from offering the polygraph evidence at his court-martial. The military judge denied the motion to dismiss. The defense counsel conceded that admission of the polygraph evidence under *United States v. Gipson*, 24 MJ 246 (CMA 1987), was discretionary, but argued the trial delay deprived the accused of an opportunity to convince the military judge that the polygraph evidence should be admitted on the merits. The judge responded, "Okay, I understand your position on that." R. 44. After trial

counsel moved *in limine* to prevent any mention of the polygraph results, the judge warned counsel not to attempt to introduce such evidence.

A1C Lynn testified in his own defense, denying criminal culpability. In rebuttal, the prosecution called A1C Lynn's supervisor, who testified that A1C Lynn had a reputation as a liar. After he was convicted, A1C Lynn again proffered the polygraph results during the sentencing phase of his court-martial, as mitigating evidence. The judge refused this request.

The Court of Appeals for the Armed Forces held that the defense counsel made a sufficient proffer of the polygraph evidence to preserve the issue for appellate review. In accordance with *United States v. Scheffer, infra*, the Court also held the judge erred in considering such evidence to be *per se* inadmissible.

In all three of these cases, the Court of Appeals for the Armed Forces found Mil.R.Evid. 707, a *per se* rule of evidence which excludes the results of any polygraph, offered for any reason, at a court-martial, unconstitutional but only to the extent that it denied an accused [1] the opportunity to admit exculpatory scientific evidence: "We do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact, in this or any other individual case. We merely remove the obstacle of the *per se* rule against admissibility," quoting from *United States v. Posado*, 57 F.3d 428 (5th Cir. 1995). *United States v. Scheffer, infra.*

REASON FOR DENYING THE WRIT

The Court of the Appeals for the Armed Forces' narrowly tailored holding which "merely remov[ed] the obstacle of the *per se* rule [of Military Rule of Evidence 707]

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[1] Respondents refer in this Brief to "court-members" and "accused" when applicable, since those are the military terms for the functional equivalent of a civilian jury and defendant, respectively.

against admissibility" of exculpatory polygraph evidence offered by a military accused was proper. Military Rule of Evidence 707 infringes upon an accused's Sixth Amendment right to present a defense. The rule is a *per se* exclusionary rule of evidence, which fails to take into account the particular facts and circumstances of an individual case. Unlike the procedure in most Federal Courts, Mil.R.Evid. 707 does not allow an accused to attempt to lay a foundation for admission of a polygraph test that may otherwise be admissible.

The reasons set forth in Mil.R.Evid. 707 for blanket exclusion of polygraph evidence are arbitrary and unreasonable. It cannot be determined in a vacuum that polygraph evidence, in all cases, under all circumstances, is confusing, a waste of time, and unreliable. This type of scientific evidence does not usurp the court-members' role, rather it may assist them in performing that role.

Finally, consideration of the uniqueness of military society does not warrant a *per se* exclusion of all polygraph evidence. Military courts routinely consider technical and scientific evidence, often far more complex than polygraph evidence, and consider expert testimony on a myriad of other issues. The carefully crafted holding in this case was rendered by the Court of Appeals for the Armed Forces, which is uniquely qualified to balance the specialized needs of military society with the fundamental right of a military accused to present his or her defense.

1. The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law." The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts."

Washington v. Texas, 388 U.S. 14, 19 (1967); *Rock v. Arkansas*, 483 U.S. 44, 52 (1987).

The combined effect of the Amendments is a "require-[ment] that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). An accused must be afforded a fundamentally fair trial in which he is afforded "an opportunity to be heard in his defense—a right to his day in court." *In Re Oliver*, 333 U.S. 257, 273 (1948).

This Court has often declared that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Moreover, in protection of this fundamental right, this Court has consistently reversed convictions where an accused is denied the opportunity to present relevant, probative evidence in his defense based on the mechanistic applications of *per se* exclusionary rules. The Supreme Court declared long ago that "[t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he has no right to use." *Washington v. Texas*, 388 U.S. at 23 (Sixth Amendment violated by arbitrary denial of accomplice testimony in favor of the defense). An accused's right to present testimony that is relevant and material may not be denied arbitrarily. *Id.*

The issue in this case is whether the government can rely on a *per se* exclusionary rule of evidence that automatically denies any accused the opportunity to lay a foundation for the admission of exculpatory scientific evidence at his court-martial, either during findings or as mitigation evidence in sentencing, and to present that favorable evidence if the proper evidentiary foundation is established.[2] This Court has said "No" in similar cases.

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[2] It cannot be overemphasized that Mil.R.Evid. 707 bars polygraph evidence in all situations, even if an accused attempts to admit a

In *Rock v. Arkansas*, 483 U.S. 44 (1987), this Court reversed a state court opinion that relied on a *per se* exclusionary rule without regard to the rights of the defendant. The defendant was charged with manslaughter based upon the shooting death of her husband. Because the defendant could not remember the precise details of the shooting, her attorney suggested that she submit to hypnosis in order to refresh her memory. She was, in fact, hypnotized twice but did not relate any new information during either of the sessions. After the hypnosis, however, she remembered details of the shooting that were corroborated by other evidence in the case.

At the time of her trial, Arkansas had a *per se* exclusionary rule that did not allow the trial court to consider whether post-hypnosis testimony was admissible in a particular case. Acting on the government's pretrial motion, the trial court had issued an order limiting the defendant's testimony to matters remembered and stated to the examiner prior to hypnosis.

In reviewing the scientific validity of hypnosis, this Court noted that "there is no generally accepted theory to explain the phenomenon, or even a consensus on a single definition of hypnosis. The use of hypnosis in criminal investigations, however, is controversial, and the current medical and legal view of its appropriate role is unsettled." *Rock*, 483 U.S. at 59 (citation and footnote omitted). Moreover, the Court stated that "[w]e are not

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polygraph test as mitigation evidence during the sentencing phase of his death penalty case. In a footnote in *Lankford v. Idaho*, 500 U.S. 110, 126 n.21 (1991), this Court noted, in regard to the admission of polygraph evidence as mitigation during sentencing in a death penalty case, that "a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable." Mil.R.Evid. 707 would exclude polygraph evidence by a military accused in such a case.

now prepared to endorse without qualifications the use of hypnosis as an investigative tool; scientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy." *Rock*, 483 U.S. at 61. Nonetheless, the Court declared:

> Arkansas, however, has not justified the exclusion of all of a defendant's testimony that the defendant is unable to prove to be the product of prehypnosis memory. A State's legitimate interest in barring *unreliable evidence does not extend to per se exclusions* that may be reliable in an individual case. Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of *all* posthypnosis recollections.

Rock, 483 U.S. at 61. (Emphasis added). *See also Davis v. Alaska*, 415 U.S. 308 (1974) (petitioner's right of confrontation is paramount to the State's rule prohibiting cross-examination of government witness concerning his probationary status as a juvenile delinquent).

In *Chambers v. Mississippi, supra*, this Court held that evidentiary rules "may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302. In *Chambers*, the defendant was convicted of murdering a policeman. After his arrest, but prior to trial, another man, McDonald, confessed to the murder in a sworn, written statement and in unsworn, oral statements to others on three separate occasions. McDonald was called as a defense witness, but repudiated his sworn statement. The defendant was unable to present a defense by cross-examining him due to a state rule preventing a party from impeaching its own witness. McDonald's oral confessions to others were excluded from evidence as inadmissible hearsay. This Court held that although the defendant was able to "chip . . . away at the fringes" of McDonald's story by the admission of other evidence, his defense was "far less persuasive than it might have been had he been given an opportunity" to present a complete defense. *Id.* at 294. Without deciding

the validity of the state "voucher" rule, and while plainly recognizing the validity and widespread acceptance of the hearsay rule, this Court held that the combination of the two evidentiary rules as applied in *Chambers* denied the defendant his right to a fundamentally fair trial. *Id.* at 303. *See also Crane v. Kentucky*, 476 U.S. 683 (1986) (exclusion of testimony about the circumstances of a confession deprived the defendant of his right to present a defense).

2. Although *Rock* involved an accused's own testimony, *Washington* and *Chambers* did not. The lesson of cases such as *Rock*, *Chambers*, and *Washington* is clear: when an accused's ability to present a defense is implicated, there must be a compelling governmental interest to overcome an accused's constitutional right. The Supreme Court provided a framework for addressing this issue in *Rock, supra*:

> . . . restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitations imposed on the defendant's constitutional right to testify.

Rock at 55-56, 107 S.Ct. at 2711.

Applying *Rock*, *Chambers*, and *Washington* to Mil.R. Evid. 707, one must look to the rationale provided by the drafters of the rule and determine whether the interests served overcome the constitutional rights of an accused to present a defense and justify the limitations imposed on an accused. The Drafter's Analysis to Mil. R.Evid. 707 (the rule was adopted in 1991) sets forth four reasons for the *per se* exclusion of polygraph evidence:

> (1) fear that court members would be misled, (2) concern that a confusion of issues would arise, (3) the possibility that the trial would incur a substantial

> waste of time, and (4) that the polygraph is inherently unreliable.

United States v. Williams, 39 MJ 555, 558 (ACMR 1993), *vacated*, 43 MJ 348 (1995).

The first three reasons provided in the drafter's analysis deal with a belief that court-members will be confused or misled by polygraph evidence. Numerous scientific studies of civilian juries, however, have determined that civilian juries are not unduly influenced or confused by polygraph evidence. *See United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989). Given the qualifications of military court members, it is also unlikely they would be influenced or confused.[3] Thus, in the drafter's analysis to Mil.R.Evid. 704, the drafters note that they are confident "[t]he statutory qualifications for military court members reduce the risk that military court members will be unduly influenced by the presentation of ultimate opinion testimony from psychiatric experts." Manual For Courts-Martial (MCM), United States, 1984, App. 22, pg. A22-46.

Further, in *Williams, supra*, the Army Court of Military Review considered the reasons for exclusion of polygraph evidence articulated by the drafters and found them wanting. They correctly noted that the first three concerns were routinely resolved by trial judges under Mil.R.Evid. 403. Moreover, the Army court declared that the "fourth reason is, in its worst light, disingenuous, and at best

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[3] Article 25(d)(2), 10 U.S.C. § 825, states in pertinent part: "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." Generally, court-martial panels are comprised of military officers, although enlisted personnel may serve at the accused's request. All officers detailed to courts-martial have at least a bachelors degree, and many have graduate degrees. Almost without exception, enlisted personnel detailed to a panel have a high school degree and have been in their branch of service for numerous years.

incongruous with the substantial investment the Department of Defense has made, and continues to make, in polygraph examinations. . . ." *Williams, supra*, at 558. As the Court of Military Appeals (now named the Court of Appeals for the Armed Forces) has noted, "[t]he greater weight of authority indicates it can be a helpful scientific tool." *United States v. Gipson*, 24 MJ 246 (CMA 1987). The first three reasons provided for creating Mil.R.Evid. 707 are unreasonable and arbitrary.

Likewise, the fourth reason advanced for the rule, that polygraph evidence is inherently unreliable, is unreasonable and arbitrary. Such an argument is contrary to the Federal Government's heavy reliance upon polygraphs, the significant advances in the field of polygraphs (*See Piccinona, supra*), and the civilian jury studies mentioned *supra*. The rule rests on a presumption of unreliability without regard to the circumstances of a particular case. The rule operates "to the detriment of any defendant" because it prohibits scientific evidence "without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced." *Rock, supra*. The rule determines that for all time and in all factual situations the scientific understanding of and support for polygraph evidence is weak and all polygraphs unreliable. By so deciding, the rule usurps the role of the trial judge, counsel, and court members. The rule ignores the usual development and acceptance of scientific evidence in criminal trials and does not allow legal practitioners to develop and argue for the scientific validity of a type of scientific evidence, as was done, for example, with DNA evidence. Fifteen years ago, DNA evidence was new and untested, the subject of controversy in both the legal and scientific communities. *See United States v. Two Bulls*, 918 F.2d 56, 58 (8th Cir. 1990). The same arguments made for creating Mil.R.Evid. 707 were made against the use of DNA evidence. Today, however, DNA evidence is generally accepted throughout the United States. The reasons set

forth for creating Mil.R.Evid. 707 are insufficient to treat polygraph evidence any differently from other scientific evidence.

3. Some may argue that a defendant does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. *See Taylor v. Illinois, supra.* The polygraph evidence in the respondents' cases, however, was not privileged and there was no evidence introduced at the courts-martial indicating the polygraph tests were incompetent. Further, Mil.R.Evid. 707 is not a "standard" rule of evidence. Every Federal Circuit except two allows for the admission of polygraph evidence. *Piccinonna, supra* (noting that, at that time, only the Fourth, Fifth, and DC Circuits had a *per se* rule against admissibility). In 1991, the Fourth Circuit noted the serious constitutional concerns involving a *per se* rule of inadmissibility of polygraph evidence, when offered by an accused. *See United States v. A & S Council Oil Co.*, 947 F.2d 1128, 1134 n.4 (4th Cir. 1991). Since *Piccinonna*, the Fifth Circuit has abandoned its *per se* rule of inadmissibility. *United States v. Pettigrew, et al.*, 77 F.3d 1500 (5th Cir. 1996), *citing Posado, supra.*

Moreover, the holding of this Court in *Rock* is applicable to scientific polygraph evidence. Like hypnotically induced testimony, it is argued that the scientific understanding of polygraph evidence is controversial and the current "legal view of its appropriate role is unsettled." Nevertheless, this argument does not justify exclusion of all polygraph evidence and denial of a defendant's right to lay a foundation for the admissibility of polygraph evidence. A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusion of evidence that may be reliable in an individual case. *Rock, supra.* Further, critics of polygraph evidence "seem to forget that no evidence can be said to be one hundred percent accurate." John J. Canham, Jr., *Military Rule of Evidence*

707: A Bright Line Rule That Needs to be Dimmed, 140 Mil.L.Rev. 65 (1993).

Article 36 of the Uniform Code of Military Justice, 10 U.S.C. § 836, does allow the President "so far as he considers practicable, [to] apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts." Petitioner's Brief, at 4. A *per se* rule of inadmissibility regarding polygraph evidence, however, is not one of those "generally recognized" rules of evidence.[4] As discussed, most of the federal circuits do not have a *per se* rule of exclusion regarding polygraph evidence. The Department of Defense relies heavily upon the use of polygraphs. In the federal government and federal courts, therefore, polygraph evidence does not lack broad acceptance. The military justice system stands essentially alone in the federal criminal courts by having a *per se* exclusionary rule of evidence which does not allow an accused the opportunity to lay a foundation for the admission of an exculpatory polygraph.

4. It is argued that polygraph evidence usurps a jury's role in determining credibility. It does not. The polygraphers in the respondents' cases were going to testify that responses to relevant questions indicated "no deception," not that, in their opinion, the respondents didn't use drugs. Such testimony is simply a form of credibility evidence. Credibility evidence is routinely admitted in criminal trials. Bias, prejudice, character for truthfulness, prior convictions, the fact that a witness is testifying under a grant of immunity, prior inconsistent statements, prior

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[4] Petitioner may argue that respondents cannot make this argument regarding Article 36a because they did not make such an argument to the court below. Respondents, however, are merely replying to petitioner's argument in its brief that Article 36a does permit the President to promulgate rules such as the rule in question. Certainly, respondents are entitled to respond to any and all arguments the petitioner has raised.

consistent statements, and being paid to testify (expert witnesses), are just some of the further types of information placed before a jury to help them in determining the credibility of the witnesses' testimony.

In the case of polygraph evidence, court members would know what tests the polygrapher has done and why he is testifying. Further, the court members could be educated to the risks of polygraph evidence through the expert testimony and cautionary instructions by the judge. The results of a polygraph, measuring bodily responses and reactions of a witness to relevant questions, can provide court members with further relevant information about a witness in order to help *them* determine credibility. Polygraph evidence does not determine the truthfulness of the allegations.

5. It is also argued that the Court of Appeals' opinion does not reflect consideration that the military is a specialized society separate from civilian society, and that the costs associated with offering polygraph evidence are particularly unwarranted and onerous in the military context. This argument fails to recognize the role of the Court of Appeals for the Armed Forces in the military justice system, the reasons articulated by the President for the promulgation of Mil.R.Evid. 707, and the nature of the case launched by the prosecution against each respondent at his court-martial.

If any court in the United States is uniquely qualified to consider the special requirements and concerns of the Armed Forces, it is the Court of Appeals for the Armed Forces, which has been doing so for the past 46 years. The Court of Appeals for the Armed Forces was specifically created to safeguard the rights of servicemembers. In creating the UCMJ and the present appellate structure in 1950, it was Congress' intent and belief that oversight of the military justice system would be increased. As Congressman Philbin from Massachusetts noted about the Court of Military Appeals (now named the Court of

Appeals for the Armed Forces) during the Congressional Floor Debate on the U.C.M.J.:

> [I]t is entirely disconnected with the Department of Defense or any other military branch, completely removed from any outside influences. It can operate, therefore, as I think every Member of Congress intends it should, as a great, effective, impartial body sitting at the top-most rank of the structure of military justice and insuring as near as it can be insured by any human agency, absolutely fair and unbiased consideration for every accused. Thus, for the first time this Congress will establish, if this provision is written into law, a break in command control over court-martial cases and civilian review of the judicial proceedings and decisions of the military.

Cong. Floor Debate on U.C.M.J., U.S. House of Representatives, Cong. Record, Vol 95, Pt 5, p.5718 (1949).

In the past, this Honorable Court has referenced decisions by the Court of Appeals for the Armed Forces when discussing the deference civilian courts should give to the special needs of the Armed Forces. *Parker v. Levy*, 417 U.S. 733, 753 (1974). In these three cases, this Honorable Court should again give great deference to the Court of Appeals' consideration of such needs when it determined that, under the military criminal justice system, the reasons set forth for the creation of Mil.R.Evid. 707 did not warrant a radical departure from the practice of the vast majority of the Federal Circuit Courts.

The concern that the rule should apply to the Armed Forces because of the Armed Forces' unique nature also ignores the reasons set forth by the drafters in the Analysis to Mil.R.Evid. 707. None of the reasons addresses any such concern. The drafters simply state that admission of polygraph evidence "[c]an result in a substantial waste of time" and "places a burden on the administration of justice that outweighs the probative value of the evidence." MCM, United States, 1984, App. 22, pg. A22-

46. Further, when Mil.R.Evid. 702 was adopted in the years prior to the creation of Mil.R.Evid. 707, the President eliminated what had been a *per se* policy excluding the results of polygraphs at courts-martial: "Para. 142*e* of the 1969 Manual, 'Polygraph tests and drug-induced or hypnosis-induced interviews,' has been deleted as a result of the adoption of Rule 702." Paragraph 142*e* of the 1969 Manual For Courts-Martial had stated that "[t]he conclusions based upon or graphically represented by a polygraph test and conclusions based upon, and the statements of the person interviewed made during a drug induced or hypnosis-induced interview are inadmissible evidence."[6] The Analysis to Mil.R.Evid. 702 further notes,

> Clearly, such evidence must be approached with great care. Considerations surrounding the nature of such evidence, any possible prejudicial effect on a fact finder, and the degree of acceptance of such evidence in the Article II courts are factors to consider in determining whether it can in fact "assist the trier of fact."

MCM, United States, 1984, App. 22, pg. A22-45. In respondents' cases, the Court of Appeals simply returned the state of the law to what it had been when Mil.R.Evid. 702 was adopted.

This Court in *Middendorf v. Henry*, 425 U.S. 25, 45-46 (1976), did state that "[t]he introduction of procedural complexities into military trials is a particular burden to the Armed Forces because virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline." That concern, however, should no longer be valid today. Today, the Armed Forces routinely goes to great lengths to prosecute complex urinalysis cases. Similarly, the

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[6] The previous bar to hypnotically induced testimony of a defendant would today be ruled unconstitutional in light of *Rock*.

Armed Forces has welcomed with open arms the use of DNA evidence in courts-martial, with all of its "procedural complexities." *United States v. Thomas*, 43 MJ 626 (AF Ct. Crim App 1995). Surely, military courts cannot be expected to allow "procedural complexities" at a court-martial to perfect the government's case, but not allow them so that an accused may present a viable defense.

Further, with respect to Air Force trial participants, the duty of military judges, defense counsels, and prosecutors is to spend their time on matters involving the imposition of discipline. Officers are assigned as military judges, circuit defense counsel, and circuit trial counsel whose sole mission is to try courts-martial in various "circuits" throughout the world. Any other tangential duties they may have are related to this primary duty. Their time is spent doing what they have been commissioned and trained to do.

6. Finally, a concern about the special needs of the Armed Forces ignores the type of case launched by the prosecution against each respondent. In all litigated cases involving a urinalysis test for drugs the prosecution is required to call an expert witness to explain the scientific test results to the factfinder and lay a proper foundation for their admission. *United States v. Hunt*, 33 MJ 345 (CMA 1991). Typically, an accused offers his or her own expert witness. Such cases are procedurally complex, highly technical, and, because of the employment of expert witnesses, can be costly.

In each case, therefore, the prosecution offered into evidence the results of a machine which measured metabolites of the drug in the respondent's urine sample. To interpret this scientific evidence and establish a proper foundation and chain of custody, the prosecution was not required to call any of the laboratory personnel who conducted the test of respondent's urine but offered an "expert witness" to explain to the factfinder what the

results of the machine that tested respondent's urine revealed. From this evidence, and no other, the factfinder was allowed to find beyond a reasonable doubt that the respondent knowingly used illegal drugs.

In his defense, each respondent testified and also wished to lay a foundation to offer into evidence the results of a machine that measured, like the machine used to test his urine, evidence which the court members could not observe. This evidence was relevant to help the factfinder determine the respondent's credibility. To interpret the results of his scientific evidence, each respondent wanted to call an expert witness to explain to the factfinder what this machine measured and explain the machine's conclusions. In each case, though, the prosecution cried foul and on appeal the United States says the respondents can't even attempt to present such evidence. The petitioner's argument is an argument the Constitution of the United States should not allow to prevail.

CONCLUSION

The fundamental problem with Mil.R.Evid. 707 is its denying an accused the opportunity to lay a foundation for the admissibility of a type of scientific evidence that may otherwise be legally and logically relevant. The rule freezes the law and progress of a category of scientific evidence, *circa* 1991. As the then named Court of Military Appeals noted in *Gipson, supra*:

> In our assessment, the state of the polygraph technique is such that, depending on the competence of the examiner, the suitability of the examinee, the nature of the particular testing process employed, and such other factors as may arise, the results of a particular examination may be as good as or better than a good deal of expert and lay evidence that is routinely and uncritically received in criminal trials. Further, it is not clear that such evidence invariably will be so collateral, confusing, time-consuming, prejudicial, etc., as to require exclusion . . . Rather, until

> the balance of opinion shifts decisively in one direction or the other, the latest developments in support of or in opposition to particular evidence should be marshaled at the trial level.

Gipson, 24 M.J. at 253.

Mil.R.Evid. 102 states that the rules of evidence shall be construed to promote the growth and development of the law of evidence. Mil.R.Evid. 707 stunts that growth. "Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States*, 358 U.S. 74, 81 (1958) (Stewart, J. concurring).

WHEREFORE, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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